terest in the corporation has a double location, and hence such a criterion is of little aid in fixing the true *situs*.

Since the stock, as such, has been created by the incorporating state, and the power of control as regards third persons is lodged there, on a practical as well as theoretical basis the stock must exist in that state.[11] A non-resident shareholder may have certain claims on the corporation, but it is only at its domicile that these can be properly enforced, and through its courts that his rights can be efficaciously administered. Some courts have gone so far as to say that the stock represents an indivisible interest in the corporate enterprise[12] — property held by the company for the benefit of the shareholder — but it is submitted that this view, if taken literally, involves an unnecessary disregard of the corporate fiction. Language sounding *in rem*, however, has properly been used in considering the nature of an action questioning the ownership of corporate stock when the adverse claimant is served by publication.[13] The elements of an ordinary action *in rem* are present, and the analogy strengthens the conclusion in the principal case, while the authorities reach a similar result on questions of garnishment.[14] The proper view would seem to be that the consensual relation of the parties has given rise to an elaborate chose in action of such a stable and permanent nature that in suits regarding its ownership it may be considered as property in the nature of a *res* existing at the domicile of the corporation.[15]

LIABILITY OF CHARITABLE CORPORATIONS FOR TORTS. — There are four views as to the extent of immunity of charitable corporations from tort liability. First, general immunity is granted. This was held in the first English case on the whole subject, on the ground that it is a breach of the trust to apply the trust funds to damages.[1] This reasoning was later discredited in England[2] and has received but slight support in the United States.[3] The same conclusion has been reached, however, on

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[11] But see *In re* Clark, [1904] 1 Ch. 294. In this case an English testator bequeathed all his personal estate in the United Kingdom to A., and all his personal estate in South Africa to B. The court held that shares in a South African company, the certificates of which were in London, passed to A.

[12] See Jellenik *v.* Huron Copper Mining Co., 177 U. S. 1, 13, 20 Sup. Ct. 559, 563; Matter of Bronson, 150 N. Y. 1, 8, 44 N. E. 707, 708.

[13] Andrews *v.* Guayaquil & Quito Ry. Co., 69 N. J. Eq. 211, 60 Atl. 568; Patterson *v.* Farmington Street Ry. Co., 76 Conn. 628, 57 Atl. 853.

[14] Harris *v.* Balk, 198 U. S. 215, 25 Sup. Ct. 625.

[15] For an interesting discussion of the relation of corporation and shareholder as a status, see 34 AM. L. REG. 448; 25 HARV. L. REV. 278.

[1] Heriot's Hospital *v.* Ross, 12 Cl. & F. 507. This was not a case of *respondeat superior*.

[2] Mersey Docks, etc. Trustees *v.* Gibbs, L. R. 1 H. L. 93.

[3] Perry *v.* House of Refuge, 63 Md. 20; Parks *v.* Northwestern University, 218 Ill. 381, 75 N. E. 991; Fire Ins. Patrol *v.* Boyd, 120 Pa. St. 624; Downs *v.* Harper Hospital, 101 Mich. 555, 60 N. W. 42. The immunity in these cases was as to torts by agents. Powers *v.* Massachusetts Homeopathic Hospital, 109 Fed. 294, exposes the weakness of the trust-fund doctrine, namely, that the liability of a private trust fund for torts is well recognized.

the more general ground that it is against public policy to diminish charitable funds. *Hill* v. *President, etc. of Tualatin Academy and Pacific University*, 121 Pac. 901 (Or.).[4] The second view is that the doctrine of *respondeat superior* does not apply to charitable corporations. An English decision,[5] later overruled,[6] had suggested this in the case of a public corporation, and the reasoning was applied to charitable corporations, by the weight of American authority.[7] Some jurisdictions refused to follow the view rejected by the English courts, but adopted a third position, namely, that an immunity should extend to torts by agents against the beneficiaries of the charity,[8] but not against outsiders.[9] Finally there is a fourth view denying immunity altogether.[10]

Which doctrine is preferable? The second view, that *respondeat superior* does not apply to public corporations because they are not making any profit appears unsound.[11] That doctrine of agency is a rule of expediency which tends practically to decrease the negligence of agents, and which throws on the principal for whom the work is being done the

[4] This was a case of dangerous premises. Other cases of general immunity are Whittaker *v.* St. Luke's Hospital, 137 Mo. App. 116, 117 S. W. 1189 (dangerous premises); Adams *v.* University Hospital, 122 Mo. App. 675, 99 S. W. 453 (negligence in selecting agent); Abston *v.* Waldon Academy, 118 Tenn. 24, 102 S. W. 351 (dangerous premises). *Cf.* Currier *v.* Trustees of Dartmouth College, 105 Fed. 886, 117 Fed. 44 (dangerous premises).

[5] Holliday *v.* St. Leonard, 11 C. B. N. S. 192.

[6] It had been decided mainly on the trust-fund doctrine and was therefore in effect reversed by the Mersey Docks case. Shortly afterwards, however, the express point again arose and Lord Blackburn (who had delivered the opinion of the judges in the House of Lords case) held that a public corporation was liable on *respondeat superior*. Foreman *v.* Mayor, etc. of Canterbury, L. R. 6 Q. B. 214. *Accord*, Gilbert *v.* Trinity House, 17 Q. B. D. 795.

[7] Hearns *v.* Waterbury Hospital, 66 Conn. 98, 33 Atl. 595; McDonald *v.* Massachusetts General Hospital, 120 Mass. 432; Jensen *v.* Maine Eye and Ear Infirmary, 107 Me. 408, 78 Atl. 898. The cases in note 3 rely in part on this reasoning.

[8] Powers *v.* Massachusetts Homeopathic Hospital, *supra*.

[9] Hordern *v.* Salvation Army, 199 N. Y. 233, 92 N. E. 626; Kellogg *v.* Church Charity Foundation of Long Island, 128 N. Y. App. Div. 214, 112 N. Y. Supp. 566; Bruce *v.* Central M. E. Church, 147 Mich. 230, 110 N. W. 951. This last case would seem properly to involve no question of *respondeat superior*, but the court overlooks it. See note 12.

[10] Glavin *v.* Rhode Island Hospital, 12 R. I. 411; Donaldson *v.* Commissioners, etc. of Hospital in St. John, 30 N. B. 279.

[11] It has been suggested that whatever be the present policy, historically the rule only applies to business relations, where there is possibility of profit. If the doctrine of *respondeat superior* is continuous from the Germanic and Roman law, as has been urged by able writers, the suggestion is clearly wrong. See Holmes, 4 HARV. L. REV. 353–364; Wigmore, 7 HARV. L. REV. 330–337, 383–405. Even if the doctrine was made out of whole cloth in the time of Charles II, when it took its present form, there is nothing to show that such a limitation is sound. It is true that one of the first of the modern cases uses the phrase "for the master's benefit." See Tuberville *v.* Stampe, 1 Ld. Raym. 264, 265 (1698). An examination of the cases shows, however, that it was used merely as the test of whether the servant was doing the work of the principal, and had no reference to profit from that work. *Cf.* WIGMORE, 7 HARV. L. REV. 392–399. The erroneous conception appears to have originated in Hall *v.* Smith, 2 Bing. 156 (1824) (a case explicable on the ground that the tort was committed by an independent contractor); to have been first squarely accepted in Holliday *v.* St. Leonard, *supra* (1861); and repudiated in Foreman *v.* Mayor of Canterbury, *supra* (1871). Historically, therefore, this limitation appears unsound. See POLLOCK, ESSAYS IN JURISPRUDENCE, 126. Incidentally, no case has suggested exempting an individual from *respondeat superior* on this ground.

burden of injury resulting in the course of its performance.[12] The policy of the rule is no less strong because the principal obtains no pecuniary benefit from the relation of agency; and that should no more excuse him from liability than the fact that he is getting no profit from his property should excuse him from the ordinary liabilities of a landowner.[13]

The next question is whether the first view of complete immunity is more satisfactory. The argument in favor of such immunity is that the social interest in having the resources of a charity unimpaired should be preferred to the interest of the individual injured. The very existence of the cases tends to show that there is some sound policy in the doctrine. Yet it is submitted that the balance is against it, for it is highly unjust in effect to compel an injured person to contribute to a charity against his will.[14] The mere fact that an institution is commendable should not relieve it from its obligations.[15]

The courts holding the third view agree in these conclusions, but lay down as another qualification of the rule of *respondeat superior*, that a recipient of charity assumes the risk of an agent's torts. Logically this would be applicable even when the donor is not a charitable institution, and this result has been reached.[16] Accordingly this view does

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[12] See POLLOCK, *id.* 114–131; Report of Committee on Employers' Liability, 1876–1877: testimony of Bramwell and Brett, JJ., 1098 *et seq.*, 1915 *et seq.* The rule may be compared to the liability of an owner for injuries committed by animals, or to the Fletcher *v.* Rylands principle. In each there is liability without fault, and there is responsibility for somewhat more distant effects than are usually considered proximate results. Some objection is made to this imposition of liability without fault and it may be noted that under the German Code the doctrine of *respondeat superior* has been largely done away with. See SCHUSTER, GERMAN CIVIL LAW, pp. 155–157. It is submitted, however, that the doctrine is justified on mainly the same grounds of expediency upon which workmen's compensation acts are being supported.

[13] If any exception to *respondeat superior* is to be made in the desire to limit a doctrine holding one liable without fault, it certainly ought not be made in the case of corporations; because in their case that ground of objection is particularly weak. For even when a corporation is held for breach of a non-delenable duty such as care of its premises, there is no moral fault in the corporation. The moral fault is in the agent who failed to act, just as in *respondeat superior* the moral fault is in the agent who acted tortiously. Therefore to hold a corporation on *respondeat superior* is no more unjust than to hold it for other torts. That there is no difference in justice or practical effect as to which ground the corporation is being held upon, is shown by the fact that the principal case and those cited in note 4, and one in note 9, seem to assume that *respondeat superior* governs both classes of cases. *Cf.* Whittaker *v.* St. Luke's Hospital, *supra*: "The rule of *respondeat superior* (or if not technically that, akin to it)." The importance of the distinction as a matter of analysis is emphasized in Mersey Docks, etc. Trustees *v.* Gibbs, *supra*, and in Hewett *v.* Woman's Hospital Aid Association, 73 N. H. 556, 64 Atl. 190.

[14] The injustice is still more striking when the principle is extended to hospitals conducted by railroads, with indirect benefit to themselves. Arkansas Midland R. Co. *v.* Pearson, 98 Ark. 399, 135 S. W. 917. See 25 HARV. L. REV. 83. This particular case and others like it may well be put, as the court suggests, on the ground that a doctor is usually an independent contractor, and hence *respondeat superior* does not apply.

[15] For a discussion of the analogous question of tort liability of municipal corporations, see 25 HARV. L. REV. 646. The English cases holding municipal corporations liable in municipal functions on *respondeat superior* have been cited in notes 2 and 6.

[16] Wallace *v.* Casey Co., 132 N. Y. App. Div. 35, 116 N. Y. Supp. 394. Here the philanthropist was a factory-owner.

not represent any principle peculiar to charitable corporations; but as a general doctrine of agency it appears to be based on a totally fictitious presumption and unsupported by any sound policy.[17] It is but another example of the tendency exhibited by courts holding the second view, to engraft exceptions upon the principle of *respondeat superior*. This view, however, suggests a fifth possibility, namely, that charitable corporations should be exempt from all tort liability to beneficiaries. The policy in favor of such a rule would be the one discussed above in connection with absolute immunity; and the objections there urged would be less strong here. Since there is in this country a general recognition of some immunity, this delimitation of it would appear least undesirable.

LIABILITY OF RAILROAD RIGHT OF WAY FOR LOCAL ASSESSMENTS. — The liability of a railroad right of way for local assessments is a matter upon which the authorities are not always clear. In accord with the weight of authority[1] is a recent case in Missouri, in which the right of way was held to be subject to an assessment for street improvements. *Gilsonite Construction Co.* v. *St. Louis, Iron Mountain & Southern Ry. Co.*, 144 S. W. 1086. The contrary result in a number of cases[2] and the failure of the courts to give the exact basis of decision has produced an apparent conflict of authority, which, on closer examination, is rather a confusion resulting from differences of local law. It is clear that a denial of liability must rest on one of two grounds: either the statute is unconstitutional; or it does not in terms include the railroad right of way in the description of property subject to assessment.

Almost all the cases which deny liability appear to have been decided on the latter ground. The frequent and misleading objection, that no property can be subject to a local assessment unless actually benefited, is referable to the fact that the statute in question usually provides in terms that only property benefited shall be assessed, and the tribunal authorized has found, as a fact, no benefit.[3] In other cases, the courts have held the words of the act, such as "lot or parcel"[4] and "owner,"[5] inapplicable to a right of way or the proprietor of a mere easement. The existence of a public policy opposed to the piecemeal sale of rail-

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[17] It relies on a far-fetched analogy to the fellow-servant rule, and seems as regrettable as that doctrine. Wallace *v.* Casey Co., *supra*, also relies upon a line of reasoning somewhat similar to that discussed above, that *respondeat superior* is based on profit, and does not apply when the principal is conferring a benefit on the injured person.

[1] Chicago, Milwaukee & St. Paul Ry. Co. *v.* City of Milwaukee, 133 N. W. 1120 (Wis.); Louisville, New Albany & Chicago Ry. Co. *v.* State, 122 Ind. 443, 24 N. E. 350. See ELLIOTT, RAILROADS, 2 ed., § 786.

[2] Southern California Ry. Co. *v.* Workman, 146 Cal. 80, 79 Pac. 586.

[3] Village of River Forest *v.* Chicago & Northwestern Ry. Co., 197 Ill. 344, 64 N. E. 364; State, etc. Co. *v.* City of Elizabeth, 37 N. J. L. 330; People *ex rel.* Davidson *v.* Gilon, 126 N. Y. 147, 27 N. E. 282.

[4] Chicago, Rock Island & Pacific Ry. Co. *v.* City of Ottumwa, 112 Ia. 300, 83 N. W. 1074.

[5] City of Muscatine *v.* Chicago, Rock Island & Pacific Ry. Co., 88 Ia. 291, 55 N. W. 100.